Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

DEBORAH D'ANNUNZIO & STEPHEN DENUNZIO,
Petitioners

VS.

BAYLOR UNIVERSITY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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33pp

QUESTION PRESENTED

1. What is the scope of the protection afforded by the anti-retaliation provision of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §215(a)(3)?

   More specifically, the question raised is whether the language of 29 U.S.C. §215(a)(3) should be strictly construed to protect against retaliation if and only if the employee has "filed a complaint or instituted or caused to be instituted proceedings under the Act", i.e. with the Department of Labor, or, alternatively, should the anti-retaliation provision of the FSLA or, alternatively, should the anti-retaliation provision of the FLSA be more broadly construed to protect employees who merely complain to their employers about wage and hour violations?

   The question presented in this case is the same, or substantially the same as the question presented in another Petition for A Writ of Certiorari, filed on October 19, 1999, and presently pending before this Court:

   NO. 99-681;
   Barry Ackerley, et al. v. Laura A. Lambert, et al

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CITATIONS FOR REPORTS OF LOWER COURT DECISIONS IN THIS CASE

United States District Court, Western Division of Texas, Waco Division: not reported. (Appendix, pages 1-2)

United States Court of Appeals for the Fifth Circuit: not reported.[1] (Appendix, pages 3-7)

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[1] Even though the Fifth Circuit has chosen to not publish its opinion, both Petitioners and Respondent acknowledged in Briefs before the Court that the scope of protection provided by the FLSA anti-retaliation provision was a pivotal issue in the trial and in the outcome of this case. Petitioner and Respondent also acknowledged that the issue was one that had not previously been decided by the Fifth Circuit. In oral argument, the Respondent even urged the Court to delay consideration of this case until this Court had had an opportunity to consider a Petition for Writ of Certiorari in *Lambert v. Ackerley*, 180 F.3d 997 (9th Cir. 1999), which is now pending before this Court as Case No. 99-681.

Nevertheless, the Fifth Circuit opinion did not expressly define the legal boundaries of the anti-retaliation provision of the FLSA. However, the court had to tacitly assume some legal standard for protection from retaliation under the FLSA in order to determine the majority of the issues raised by the Petitioners. The fact that the Court's unpublished opinion creates limited precedent should not be allowed to obstruct review by this Court, particularly in view of the conflict that exists between Circuit Courts that have addressed this issue. Further, the issue raised below and in this Petition is a "question of considerable importance to the workers ... who rely on the protections afforded by the Fair Labor Standards Act." *Lambert v. Ackerley*, 180 F.3d 997, at 1001.

STATEMENT OF JURISDICTION

Course of Proceedings

The United States Court of Appeals for the Fifth Circuit entered its judgment on August 23, 1999. (Copies of the Fifth Circuit judgment and opinion are included in the Appendix bound with this Petition, pp. 3-7.)

Petitioners' Petition for Rehearing En Banc was denied on September 21, 1999. (A copy of the Order denying the Petition is included in the Appendix bound with this Petition, pp. 8-9.)

Supreme Court Jurisdiction

Jurisdiction is vested in the Supreme Court pursuant to 28 U.S.C. § 1254(1), this being a petition for review of a judgment entered by the United States Court of Appeals for the Fifth Circuit on appeal from a Judgment entered by the United States District Court for the Western District of Texas. (Copies of the Fifth Circuit's Judgment and Opinion are included in the Appendix bound within this Petition.)

This Petition is filed for two purposes: (1) to bring upa question of importance that significantly affected the outcome of this case and that is of grave public interest in the area of employment rights, and (2) to secure uniformity of decisions between Circuit Courts of Appeals and between this Supreme Court and Circuit Courts of Appeals.

This Petition is brought to pose the question: What is the scope of protection afforded by the anti-retaliation provision of the Fair Labor Standards Act ("FSLA"), 29 U.S.C. § 215(a)(3)?

Respondent and the District Court adopted the legal position that the anti-retaliation provision of the FLSA only extends to protect employees who have actually filed a complaint with the Department of Labor ("DOL") under the FLSA or who have actually instituted or caused to be instituted DOL proceedings under the FLSA. Although the Fifth Circuit wholly failed to provide a legal analysis of the scope of protection under FLSA § 215(a)(3), Petitioners will show that the opinion of the Court necessarily assumed a very limited scope of protection against retaliation under the FLSA.

Although the Second Circuit has similarly limited the protection of the anti-retaliation provision of the FLSA in the case of *Lambert v. Genesee Hospital*, 10 F.3d 46, 56 (2nd Cir. 1993), it is the only Circuit Court that has expressly adopted such a strict interpretation of the law. At the time of trial, the Third, Sixth, Seventh, Tenth and Eleventh Circuit Courts had already adopted much more liberal interpretations of the FLSA anti-retaliation provision.[2]

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[2] *See EEOC v. Romeo Community Schools*, 976 F.2d 985, 989 (6th Cir. 1992) (holding that an employee's informal complaint is sufficient to trigger the anti-retaliation protection of the FLSA); *Crowley v. Pace Suburban Bus Div. of Regional Transp. Authority*, 938 F.2d 797, 798 n.3 (7th Cir. 1991) and *Avitia v. Metropolitan Club of Chicago, Inc.*, 49 F.3d 1219 (7th Cir. 1995) (involving a DOL-initiated, rather than an employee-initiated audit, wherein an employee stated that the employer had not paid overtime); *EEOC v. White & Sons Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989) ("The charging parties did not perform an act that is explicitly listed in the FLSA's anti-retaliation provision; however, we conclude that the unofficial complaints expressed by the women to their employer

Since the time of trial and before the Fifth Circuit entered its Judgment, two additional circuits--the First and the Ninth--rejected the strict interpretation and ruled in favor of broader protection, including protection of employees who complained to their employer but did not necessarily file complaints with the DOL. *Valerio v. Putnam Assocs., Inc.*, 173 F.3d 35 (1st Cir. 1999); *Lambert v. Ackerley*, 180 F.3d 997 (9th Cir. 1999).[3]

At least one district court has held that the protection of the anti-retaliation provision of the FLSA extends to protect a spouse employed by the same employer if the spouse suffers retaliation as a result of the actions of his or her spouse. *Marshall v. Georgia*

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about unequal pay constitute an assertion of rights protected under the statute."); *Brock v. Richardson*, 812 F.2d 121, 124 (3d Cir. 1987) (interpreting the FLSA's anti-retaliation provision to cover "activities that might not have been explicitly covered by the language", when the affected employee had not actually filed a complaint but the employer believed that the employee had done so); *Love v. Re/Max of Am., Inc.*, 738 F.2d 383, 387 (10th Cir. 1984) (finding that "[t]he Act also applies to the unofficial assertion [of] rights through complaints at work"). See also *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179 (8th Cir. 1975) (wherein the employee had no contact with the Wage and Hour Division of the DOL).

3 Originally a Ninth Circuit panel adopted the minority position that strictly limited the anti-retaliation protection of the FLSA, but the opinion was withdrawn and reversed following Rehearing En Banc. As noted supra, a Petition for Writ of Certiorari from the Ninth Circuit is now pending before this Court as Case No. 99-681, styled *"Ackerley, et al. v. Lambert, et al"*.

Southwestern College, 489 F. Supp. 1322, 1331 (M.D.Ga. 1980).

As early as 1944, the Supreme Court stated its position that a broad interpretation of the FLSA was intended by Congress, stating:

> [T}he Fair Labor Standards Act, [is] remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights that Congress has specially legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner.

Tennessee Coal, Iron and Railroad Co. v. Muscoda Local No. 123, 321 U.S. 590, 64 S.Ct. 698, 703, 88 L.Ed. 949 (1944). Subsequently, the Supreme Court in *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292, 80 S.Ct. 332, 335, 4 L.Ed.2d 323 (1960), giving consideration to public policy issues, provided additional support for a more expansive interpretation of FLSA §215(a)(3). In *DeMario Jewelry*, the Court examined the "central aim" of the entire FLSA. In so doing, the Court made the point that "Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced" by recognizing "that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions."

Courts that have construed the meaning of the anti-retaliatory provision more broadly so as to include less formal complaints by employees, have justifiably relied on the policy statements of the Supreme Court. For example,

in *Wittenberg v. Wheels, Inc.*, 963 F.Supp. 654, 659 (N.D. Ill 1997), the court noted that:

> ...the basic purpose of the FLSA was stated in Section 2 in the findings and declaration of policy that provided that:
>
> > 'It is declared to be the policy of the chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above-referenced to in such industries without substantially curtailing employment or earning power'. 29 U.S.C. § 202(b).
>
> In addition, the overtime provision of the FLSA provides:
>
> > '[No] employer shall employ any of his employees ... for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.' 29 U.S.C § 207(a)(1).
>
> Given that the FLSA was meant 'to correct and as rapidly as practicable [] eliminate' the existence of unpaid overtime, the court finds that the anti-retaliation provision of §215(a)(3) should be read to encompass informal complaints that implicate rights under the FLSA." Id. At 659-660.

Statement of Material Facts

Petitioners[4] are married and both were employees of Baylor. (T.25)[5]

Deborah was employed in the Baylor Financial Aid Office from 1993 through August 16, 1996. (T.25) From 1995 forward, she worked as a Financial Aid Counselor, which was classified by Baylor as an exempt position under the FLSA. (D. Ex. 33) In late April or early May, 1996, Deborah and Steve began to investigate the possibility of filing a complaint with the Department of Labor (hereafter "DOL"), asserting that the Financial Aid Counselor's position was actually a non-exempt position and that Deborah was entitled to recover back wages for overtime worked in that position and in her prior position. (T.252-253, 40-41)[6] In a letter dated June 21, 1996, Deborah

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[4] Hereafter, Petitioners will be referred to as "Deborah" and "Steve" respectively. Their different spellings of the surname is based on their individual preferences--for the original or Americanized version of the family name.

[5] The parties proceeded to trial in this case. Deborah's case was submitted to the jury. Steve's case was dismissed as a matter of law prior to jury submission. References included in this statement of facts are to pages of the transcript of trial testimony and to trial exhibits, which are designated as "T._____", "P.Ex._____" and "D.Ex._____" respectively.

[6] The Petitioners' initial contact with DOL in April or May, 1996, followed two incidents in April. One occurred on April 9, when Deborah had worked a twelve-hour day without eating and had passed out in the ladies room, suffered a concussion and was taken by

notified her supervisors (Pat Lucas, Jeanette Kucera, and Bill Dube) and Baylor's Director of Personnel, Claude Ervin, that she was concerned that her position was improperly classified as an exempt position in order to save overtime expense. (T. 44, T. 253-254, P. Ex. 16) The letter evoked a very negative response. (T. 254) By letter dated July 8, 1996, Deborah advised Mr. Ervin that she had filed a "complaint" with the DOL but she did not actually file any document with the DOL until July 15, 1996. (T. 254-256, P. Ex. 1) After her July 8th letter to Mr. Ervin, Deborah noticed that she was being "watched" by Robert Allen, one of the supervisors in the Financial Aid Department. She attempted to obtain a transfer from the department. (T. 255-256) Transfer applications were processed by Linda Tonkin, an employee in Baylor's Personnel Office. (T.88) In late July, Linda Tonkin told Deborah that, after the July 8th letter, Mr. Ervin had said that Deborah had "cooked her goose." (T. 258-259)[7] On

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paramedics to the hospital--after 8:00 at night. The following Saturday, she was sick and did not attend a mandatory workday. She was reprimanded by her supervisor the following Monday. Much later in April, at a staff meeting, Deborah's supervisor told the counselors that in addition to their regular overtime they would be taking extra work from the grant and loan areas and that if they were not able to do that "then [they] knew where the door was and [they] could leave." (T. 411-412, 180) The grant and loan processors were regularly paid overtime as non-exempt employees. However, the financial aid counselors were never paid overtime because they were classified as exempt employees. (T. 182-183)

[7] Ms. Tonkin did not testify at trial. However, Mr. Ervin confirmed that he did make the statement that Deborah "had cooked her goose at Baylor" after he

August 16, 1996, Deborah was notified that her employment at Baylor was involuntarily terminated effective August 31st. She requested to be furnished a reason for her termination but Mr. Ervin refused to furnish a reason. (T. 89-90) Deborah filed a grievance with Baylor's Personnel and Benefits Committee, but her grievance was denied. At the meeting where the grievance was denied, Mr. Ervin told the committee that Deborah had abandoned her job. (T. 89-90, 107-109) Baylor later claimed that Deborah was discharged because of insubordinate behavior on August 8, 1996; however, Mr. Ervin testified that he never considered the August 8th incident to be a "conduct" issue (T. 100) and stated only that insubordination (i.e. conduct) was a "major consideration" in the termination of Deborah's employment. (T.102)[8] After her discharge, Deborah pursued a more formal complaint with the DOL and in November of 1996, a DOL investigator advised Mr. Ervin that Deborah's position was a non-exempt position and that Baylor owed her back wages for overtime work. (T. 477-478) Baylor did not agree with the DOL's determination and did not tender to Deborah the back wages calculated by the DOL. (T. 335-336)[9] In 1997, the DOL conducted an on-site investigation and audit of the records of all other Baylor Financial Aid Counselors and

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received her letters of June 21, 1996 and July 8, 1996, and before she was terminated on August 16, 1996. (T. 93-94)

[8] Mr. Ervin also characterized Deborah's letter of June 21, 1996, as "insubordinate". The June 21st letter was Deborah's first written statement to Baylor of her opinion that the Financial Aid Counselor's position was non-exempt. (T. 85-88)

[9] This suit was filed in August of 1997.

again determined that the positions were non-exempt and calculated back wages due from September, 1995 to September of 1997. (T. 480-482, 469-470.) In January of 1998, Baylor paid back wages to everyone, except Deborah, and reclassified the positions. (T.480-482, 335-336)

Steve was employed by Baylor as a Project Assistant in Baylor's Department of Education beginning January 1, 1996. (T. 26) His supervisor was Larry Browning. (T. 29) On April 26, 1996, Steve received a written evaluation rating his job performance as "above standards" in all six performance standards. (T.30) After Steve and Deborah began to investigate the filing of a DOL complaint in late April or early May of 1996, Steve told his co-workers and his supervisor that he and Deborah were of the "opinion" that Deborah had an FLSA complaint against Baylor for unpaid overtime wages. (T. 41-42) On July 15, 1996, one week after Deborah had notified Baylor that she had filed a DOL complaint[10], Larry Browning notified Steve that the grant project for which he was employed was not going to be renewed and Steve would not be employed in any other project after October 31, 1996.[11] (T. 31-32, 69) On July 25, 1996, Steve applied for another position at Baylor, for which he was qualified. He delivered his application to Linda Tonkin for processing. Linda Tonkin told him that his application would not be considered because Mr. Ervin

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10 As noted supra, on July 8, 1996, Deborah had delivered a letter to Baylor's Personnel Officer, Mr. Claude Ervin, stating that she had filed a DOL complaint asserting that the Financial Aid Counselor's position was a non-exempt position.

11 The grant actually was renewed in November of 1996. (T. 47-48)

would not let it be considered "because of Deborah's situation." (T. 32-37, P. Ex. 128) Believing that there was no opportunity for continued employment at Baylor, Steve obtained employment elsewhere at a lower rate of pay and benefits by August 1, 1996. He gave immediate notice to Baylor and his employment at Baylor terminated August 15, 1996. (T. 67, 69) Although Steve had received an "above standards" evaluation in April--prior to Deborah's complaints abour FLSA violations, at the time Steve was discharged, his supervisor, Mr. Browning rated him as a "fair" employee and noted specifically that Steve was "not" eligible for rehire. (T.39-40, P.Ex. 106)

Standard of Review

The following issues on appeal to the Fifth Circuit are controlled by the single question presented in this Petition for Writ of Certiorari:

(1) Whether, giving due consideration to the scope of protection afforded by the anti-retaliation provision of the FLSA and the evidentiary record in Deborah's case, the jury instructions given and/or refused by the district court were erroneous so as to create a substantial and ineradiable doubt that the jury was properly guided in its deliberations; and

(2) Whether, giving due consideration to the scope of protection afforded by the anti-retaliation provision of the FLSA and the evidentiary record in Steve's case, the courts below erred in holding that Stephen Denunzio failed to present any probative evidence sufficient to raise a a material issue

> of fact as to whether or not his constructive discharge was retaliatory.

The standard of review for each of the specific issues is set forth below.

Jury Instruction. For assertion of error relating to jury instructions, the Court employs the standard of review discussed in *F.D.I.C. v. Mijalis*, 15 F.3d 1314 (5th Cir. 1994):

> First, the challenger must demonstrate that the charge as a whole creates "substantial and ineradicable doubt whether the jury has been properly guided in its deliberations." Second even if the jury instructions were erroneous, the court will not reverse if it determines, based upon the entire record, that the challenged instruction could not have affected the outcome of the case.

Id. at 1318, citing *Bender v. Brumley*, 1 F.3d 271, 276 (5th Cir. 1993).

If the party complaining of an incorrect jury instruction on appeal proposed another instruction to the district court, their proposed instruction must have correctly stated the law. *Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1216 (5th Cir. 1995). In short, the critical issues are whether it was correct to instruct the jury with the objected to instructions, and, if incorrect, was the error harmless? *Bender*, 1 F.3d at 277.

Judgment as a Matter of Law/Summary Judgment. The Court reviews the grant of summary judgment de novo, applying the same standard as the district court. *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 956 (5th Cir. 1993). Summary judgment is appropriate only when there

is not genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). There is no genuine issue of material fact if the evidence is such that, drawing all reasonable inferences in favor of the non-movant a reasonable jury could not return a verdict in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-51, 106 S.Ct. 2505, 2510-11, 91 L.Ed.2d 202 (1986).

Argument and Authorities

The district court in this case adopted the position that the FLSA anti-retaliation provision only protects employees who actually file a complaint or institute or cause to be instituted proceedings with the Department of Labor under the FLSA.[12]

The district court instructed the jury that Deborah had to prove that Baylor terminated her because she "has filed complaint or instituted or caused to be instituted a proceeding under the FLSA" (R.325) and that "the individual making the adverse employment decision, if any, knew, at the time of the decision, that the Plaintiff had filed or instituted or caused to be instituted any proceedings under the Fair Labor Standards Act." (R.326) The court further instructed the jury that "[a]n employee has not filed a complaint nor instituted any proceeding under the Fair Labor Standards Act by merely expressing his or her concerns about not being paid for overtime

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12 The same district court had previously adopted the same position in a case styled *Recker v. Amtech Corp.*, No. W-93-CA-264 (W.D.Tex. 1994), relying on the then-recent decision in *Lambert v. Genesee*, 10 F.3d 46 (2nd Cir. 1993), wherein the Court had limited the scope of protection under the FLSA anti-retaliation provision.(R. 295-296)

work to supervisors or coworkers" and that "the FLSA does not protect an employee for merely complaining to supervisors or coworkers about not being paid extra for overtime work." (R. 325) Petitioner repeatedly objected to the Court's instructions as unreasonably restricting the scope of the FLSA anti-retaliation provision. (T. 419-424) Petitioner also requested, but was refused submission of the following instruction: "In order to be protected from retaliation under the Fair Labor Standards Act, an employee need not actually file a complaint with the Department of Labor, but instead protection attaches to employees who make informal protests and unofficial protests to their supervisors." (R.287)

In its Motion to Dismiss Steve's claim, Respondent Baylor stated as grounds therefor that Steve had failed to produce any evidence that he, rather than Deborah, "had filed a complaint or instituted or caused to be instituted proceedings under the FLSA." (T. 341-345)[13] The court granted Baylor's Motion. (T. 349)

As noted supra, the district court adopted the legal position that the anti-retaliation provision of the FLSA, i.e. 29 U.S.C. §215(a)(3), only extends to protect employees who have actually filed a complaint under the FLSA or who have actually instituted or caused to be instituted proceedings under the FLSA. Although the Second Circuit has similarly limited the protection of the anti-retaliation provision of the FLSA in the case of *Lambert v. Genesee Hospital*, 10 F.3d 46, 56 (2nd Cir. 1993), it is the only Circuit Court that has adopted such a strict interpretation of the law. As noted supa, the Third,

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13 Written motions and briefs relating to the scope of protection against retaliation under the FLSA appear in the record. (R. 290-300.)

Sixth, Seventh, Tenth and Eleventh Circuit Courts had already adopted much more liberal interpretations of the FLSA anti-retaliation provision.[14] Since the trial two other circuits--the First and the Ninth--have rejected a strict interpretation of the FLSA anti-retaliation provision and ruled in favor of broader protection, including protection of employees who complain to their employer but do not file complaints with the DOL. *Valerio v. Putnam Assocs., Inc.*, 173 F.3d 35 (1st Cir. 1999); *Lambert v. Ackerley*, 180 F.3d 997 (9th Cir. 1999). Also, as noted supra, at least one district court has held that the protection of the anti-retaliation provision of the FLSA extends to protect a spouse employed by the same employer if the spouse suffers retaliation as a result of the actions of his or her spouse. *Marshall v. Georgia Southwestern College*, 489 F. Supp. 1322, 1331 (M.D.Ga. 1980).

The appellate record in this case compelled the Fifth Circuit Court of Appeals to address the issue of the scope of protection afforded by the FLSA anti-retaliation provision. The evidence shows that Deborah made no secret of the fact that, in her opinion, the overtime demands in the Financial Aid Office were unreasonable, and she told her co-workers that they were entitled to be paid overtime wages for their extra hours of work. She also advised her supervisors and Baylor's Personnel Director that she thought that the position of Financial Aid Counselor was inappropriately classified as an exempt position in order to avoid payment of overtime. She even told the Personnel Director that she had filed an FLSA complaint on July 8, 1996, although she did not file her information sheet and authorization for release of her Baylor employment records with the DOL until July 15,

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[14] See Footnote 2 above.

1996. At trial, Baylor repeatedly stressed that Deborah did not file a "formal complaint" with the DOL until August 21, 1996, 5 days after her discharge and that the DOL records did not contain a copy of the information sheet and release that she allegedly filed on July 15th. Despite the evidentiary record of Deborah's complaints to supervisors and to Baylor's Personnel Office, the jury was instructed that complaints to supervisors about non-payment of overtime did not constitute complaints sufficient to invoke the protection of the anti-retaliation provision of the FLSA. Consequently the jury was required to disregard such complaints in deciding whether or not Deborah established a prima facie case of retaliation.

The first step in the legal analysis required for a review of this case in the Fifth Circuit is simply missing from the panel's opinion. The Court wholly failed to define the boundaries of the protection afforded by the FLSA anti-retaliation provision. If the Fifth Circuit tacitly determined that complaints to supervisors are not sufficient to invoke the protection of the anti-retaliation provision of the FLSA, then the opinion of the panel is correct based on the facts, but the legal position of the Court would conflict with at least seven other Circuit Courts of Appeals. On the other hand, if the Fifth Circuit Court determined that complaints to supervisors are sufficient to invoke the protection of the anti-retaliation provision of the FLSA, then the Court's legal conclusion conforms to the majority view of the Circuits who have decided this issue, but the conclusion of the Court is erroneous for the reason that there is clearly substantial and ineradicable doubt that the jury's instructions properly provided proper instructions for defining the scope of protection afforded by the FLSA and for guiding the jury in its deliberations.

Similarly, if this Court has determined that complaints to supervisors are sufficient to invoke the protection of the anti-retaliation provision of the FLSA, then there was clearly sufficient evidence to raise a fact issue as to whether or not Steve lost his employment at Baylor because he voiced his concern and supported Deborah's position relating to the illegality of Respondent Baylor's classification of Deborah's employment position.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioners pray that this Honorable Court grant petitioners' Petition for Writ of Certiorari, review the decision of the Fifth Circuit Court of Appeals, rendered on August 23, 1999, reverse the judgment of the Fifth Circuit Court of Appeals and remand this case to District Court for a new trial on the merits.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

WACO DIVISION

DEBORAH D'ANNUNZIO and STEPHEN DeNUNZIO,	§	
Plaintiffs,	§	
	§	
v.	§	**Civil No. W-97-CA-278**
	§	
BAYLOR UNIVERSITY,	§	
Defendant.	§	

JUDGMENT

This case came on for trial before the Court and a jury on the 15th through 17th days of June, 1998 on all remaining issues with the exception of the issue of Deborah D'Annunzio's liquidated damages. This issue was presented to the Court, without the jury, following the jury trial. The Court, having considered the pleadings, the evidence, the arguments of counsel, the jury's verdict, and post trial briefs submitted by counsel, is of the opinion that judgment should be entered as follows:

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff **DEBORAH D'ANNUNZIO** have and recover nothing from Defendant **BAYLOR UNIVERSITY** by virtue of the jury's verdict in this case.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff **DEBORAH D'ANNUNZIO** have and recover nothing with regard to liquidated damages by virtue of the Court's findings of fact and conclusions of law which have been filed on this issue.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff **STEPHEN DeNUNZIO** have and recover nothing from Defendant **BAYLOR UNIVERSITY** by virtue of the Court having granted Defendant's Motion for Judgment as a matter of law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff recover $1,000.00 as attorneys fees. Costs incurred before December 23, 1997 are to be borne by the party incurring them; costs incurred on or after December 23, 1997 are assessed against Plaintiff.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any pending pre-trial motions are **DENIED** as moot in light of the Court's dismissal of this action.

SIGNED this 7th day of July, 1998.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 98-50824

D.C. Docket No. W-97-CV-278

DEBORAH D'ANNUNZIO; STEPHEN DENUNZIO

Plaintiffs - Appellants

v.

BAYLOR UNIVERSITY

Defendant - Appellee

Appeal from the United States District Court
for the Western District of Texas, Waco

Before JONES and WIENER, Circuit Judges, and LITTLE*, District Judge.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

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*District Judge of the Western District of Louisiana, sitting by designation.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: SEP 1999

A true copy
Test

Clerk, U.S. Court of Appeals,
Fifth Circuit

By /s/Shari Stewman
Deputy

New Orleans, Louisiana

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50824

DEBORAH D'ANNUNZIO & STEPHEN DENUNZIO,
Plaintiffs-Appellants

versus

BAYLOR UNIVERSITY,
Defendant-Appellee

Appeal from the United States District Court
for the Western District of Texas
USDC No. 97-CV-278

Before JONES, and WIENER, Circuit Judges, and LITTLE*, District Judge.

PER CURIAM:**

After full record review, we find that the challenges to the

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*District Judge of the Western District of Louisiana, sitting by designation.

**Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

jury instructions given in the matter involving Deborah D'Annunzio do not create a substantial and ineradicable doubt that the jury was properly guided in its deliberations. See Mooney v. Aramco Services, Inc., 54 F.3d 1207, 1216 (5th Cir. 1995).

The trial court dismissed the claim of Stephen DeNunzio under Federal Rules of Civil Procedure Rule 50(a). We review a Motion for Judgment as a Matter of Law de novo. We have, as is required, reviewed the entire record in the light most favorable to the non-movant and have drawn all inferences in his favor. Nero v. Industrial Molding Corp., 167 F.3d 921, 925 (5th Cir. 1999; Omnitech International, Inc. v. The Clorox Corp., 11 F.3d 1316, 1322 (5th Cir. 1994). The district court's resolution is correct. Mr. DeNunzio offered no evidence that he had filed any proceedings with the Department of Labor prior to his discharge. Moreover, Mr. DeNunzio did not present evidence that any of his supervisors knew of the dissatisfaction with employment conditions that was harbored by his wife. Evidence of retaliatory discharge is absent.

The finding by the trial court that Baylor was in good faith and had reasonable grounds to classify Deborah D'Annunzio as an employee exempt from FLSA coverage was not clearly erroneous. See Lee v. Coahoma County, Mississippi, 937 F.2d 220, 226-27 (5th Cir. 1991); see also Heidtman v. County of El Paso, 171 F.3d 1038, 1038 (5th Cir. 1999). Baylor submitted more than adequate evidence in support of its good faith defense. In particular, the testimony of Bill Dube and Claude Ervin when coupled with the audit by the Office of Federal Contract Compliance Programs, which found no fault with the Baylor administration, are indeed supportive of the district judge's decision. The judge did not abuse his discretion in refusing to award liquidated damages. Id. Therefore, we affirm the denial of D'Annunzio's claim for liquidated damages.

We find no abuse of discretion in the trial court's evidentiary ruling that excluded the in globo Department of Labor

files. Johnson v. Ford Motor Co., 988 F.2d 573, 578 (5th Cir. 1993). The files, which were never proffered when the admission was denied, were voluminous and may have contained inadmissible components. The trial judge invited the attorney to harvest the admissible and relevant documents from the file and offer the product of that exercise. The attorney for the plaintiff did not accept the invitation. In light of the foregoing, the judge's exclusion of the entire file was not erroneous. McClure v. Mexia Independent School District, 750 F.2d 396, 401-02 (5th Cir. 1985); Shumate & Co. v. National Association of Securities Dealers Inc., 509 F.2d 147, 155 (5th Cir. 1975). Likewise, the district judge did not abuse his discretion in excluding D'Annunzio's testimony concerning the amount of her overtime damages. See Allread v. City of Grenada, 988 F.2d 1425, 1435-36 (5th Cir. 1993).

Analysis by the district court of the facts considered when making an attorney's fees award facilitate review on appeal. When, as here, the record sufficiently reflects the data submitted and considered by the court prior to its ruling, we find no error. The plaintiff's motion for fees was not supported by a detailed brief but was bottomed on an affidavit of the plaintiff's attorney and a log of legal services performed. The brief in response from the defendant's counsel was replete with citations, including the factors to be considered when awarding reasonable attorney fees in a FLSA matter. The decision of the trial judge followed the filings from the lawyers. There is no evidence that the trial judge did not consider the cogent filings that preceded his decision. In this case, it is unnecessary to remand the attorney's fees issue for specific findings by the district court. See Riley v. City of Jackson, Mississippi, 99 F.3d 757, 760 (5th Cir. 1996).

Accordingly, the judgments of the district court are AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 98-50824

DEBORAH D'ANNUNZIO; STEPHEN DENUNZIO
Plaintiffs - Appellants

v.

BAYLOR UNIVERSITY
Defendant - Appellee

- - - - - - - - - - -

Appeal from the United States District Court
for the Western District of Texas, Waco

- - - - - - - - - - -

ON PETITION FOR REHEARING EN BANC

(Opinion 8/23/99, 5 Cir., _____, _____ F.3d _____)

Before JONES and WIENER, Circuit Judges, and LITTLE*, District Judge.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active

*District Judge of the Western District of Louisiana, sitting by designation.

service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge

FILED September 21, 1999

Supreme Court, U.S.
FILED
JAN 26 2000
CLERK

No. 99-1086

In The

Supreme Court of the United States

DEBORAH D'ANNUNZIO and
STEPHEN DENUNZIO,

Petitioners,

v.

BAYLOR UNIVERSITY,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

BAYLOR UNIVERSITY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

The petition correctly lists the interested parties except as follows. Counsel for Respondent are:

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Baylor University, a Texas non-profit corporation, does not have any parent corporations. Baylor University has no nonwholly-owned subsidiaries.

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BAYLOR UNIVERSITY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Baylor University ("Baylor"), respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioners, Deborah D'Annunzio and Stephen DeNunzio, seeking review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit rendered on August 23, 1999.

STATEMENT OF THE CASE

Course of Proceedings and Disposition in the Courts Below

This case proceeded to trial before a jury on June 15, 1998. At the close of Petitioners' evidence, the District Court dismissed Stephen DeNunzio's claim because he failed to present sufficient evidence to raise an issue to submit to the jury. Following the presentation of further evidence, the District Court submitted Deborah D'Annunzio's Fair Labor Standards Act retaliation claim to the jury. After deliberating less than one and a half hours, the jury found that Baylor did not retaliate against Ms. D'Annunzio.

Petitioners appealed to the United States Court of Appeals on August 27, 1998, and raised six issues for appellate review. The Fifth Circuit heard oral argument on August 4, 1999, and, less than three weeks later, on August 23, 1999, the Court of Appeals panel issued an unpublished per curium opinion affirming the judgments of the District Court in their entirety. Petitioners requested rehearing en banc. Not a single judge of the

Fifth Circuit thought that the case even merited a poll of the Court on the Petition for Rehearing En Banc; thus, the Court denied the Petition for Rehearing En Banc on September 21, 1999.

Statement of Facts

Most of the "facts" contained in Petitioners' Statement of Facts are not relevant to the issues on appeal. Further, many of these facts were hotly contested at trial, and the jury obviously rejected Petitioners' version of the facts. Petitioners have apparently decided to include a lengthy unnecessary recitation of contested facts in an effort to place their case in a more favorable light before this Court. As Petitioners have submitted a lengthy factual recitation, Baylor must at least respond with a limited recitation of the facts which the jury found to be more credible.

Baylor employed Petitioner Deborah D'Annunzio as an employee in Baylor's Student Financial Aid Office. During the three years that she worked at Baylor, Ms. D'Annunzio held several different positions in the Financial Aid Office. At the time of her termination, Ms. D'Annunzio worked as a Financial Aid Counselor.

Ms. D'Annunzio's husband, Stephen DeNunzio, was a student at Baylor during the first two years of Ms. D'Annunzio's employment at Baylor. Mr. DeNunzio started as a law student, but he then switched to a master's degree program in educational psychology. Ms. D'Annunzio also pursued a master's degree in educational psychology as a part-time student by taking evening classes.

By the summer of 1996, Ms. D'Annunzio determined that it would take her three years to complete her master's degree if she continued to attend school part-time but that she could complete the degree in one year if she attended school full-time. Realizing that she could earn more money once she obtained the master's degree, it made economic sense for Ms. D'Annunzio to quit her job and attend school full-time; however, Ms. D'Annunzio did not want to give up the income from her job at Baylor. Thus, Ms. D'Annunzio set out to cause enough trouble at work so that Baylor would have to fire her, and she could then make a claim for unemployment compensation and perhaps also sue Baylor. Ms. D'Annunzio even registered for a full course load for the fall semester before her employment at Baylor was terminated. During the Summer of 1996, Ms. D'Annunzio began challenging her supervisor, Pat Lucas, and acting disrespectfully toward her. Baylor attempted to work with Ms. D'Annunzio to correct her performance problems rather than terminating her as Ms. D'Annunzio desired. With the fall semester about to start in a few weeks, Ms. D'Annunzio needed to do something to force Baylor to terminate her; thus, she engaged in a yelling fit directed toward Ms. Lucas on August 8, 1996.

A number of witnesses testified about Ms. D'Annunzio's behavior at the time she threw the fit. According to the witnesses, Ms. D'Annunzio was standing up, waving her arms, and yelling at Ms. Lucas. Ms. D'Annunzio told Ms. Lucas that Ms. Lucas did not know what was going on in the office and was not concerned about the employees. Ms. D'Annunzio was shouting so loudly that Ms. Lucas had to close the door because the shouting

could be heard all over the office. In all the years she had worked at Baylor, Ms. Lucas had never seen an employee behave in such a manner.

Robert Allen, another supervisor, heard Ms. D'Annunzio's voice from his office fourteen steps away and went to investigate. He described the tone of her voice as very angry and very hostile. Another witness, Celeste Sheehy, described Ms. D'Annunzio's tone of voice as being very accusatory toward Ms. Lucas. Ms. Sheehy was "floored and shocked" by Ms. D'Annunzio's behavior. Ms. Sheehy described the incident as a personal and professional attack on Ms. Lucas. Another witness, Kathy Gulley, testified that Ms. D'Annunzio was "going nuts" during the incident and that she was scared by the behavior. Another witness to the incident, Julie Burleson, testified that she thought to herself, "She must be trying to get herself fired."

Ms. Lucas needed to confer with her supervisor, Jeanette Kucera, about what should be done about Ms. D'Annunzio's behavior. Ms. Kucera was out-of-town on the day of the incident, and Ms. Lucas conferred with her when she returned to work. Due to the tension and turmoil created in the office by Ms. D'Annunzio's behavior, the decision was made to send her home pending a final decision. Although she was told that she was simply being asked not to report to work for a few days, Ms. D'Annunzio took the position that she was being fired and proceeded to pack up and clear out her office. After several meetings, Ms. D'Annunzio's supervisors determined that it would be best for all concerned to terminate her employment, and Baylor informed Ms. D'Annunzio of the termination decision on August 16, 1996. At the

time the termination decision was made, Ms. Lucas and Ms. Kucera did not know that Ms. D'Annunzio had filed a complaint with the Department of Labor. Shortly after the termination, Ms. D'Annunzio registered to take an additional class for the fall semester. Ms. D'Annunzio graduated one year after the termination and obtained employment at a higher salary than she had earned at Baylor.

After obtaining his master's degree, Stephen DeNunzio was hired in January 1996 for a ten month term to work as a project assistant on a state-funded research project being conducted by a Baylor professor. By the summer of 1996, there was some uncertainty as to whether the grant would be renewed, and Mr. DeNunzio searched for other employment. He quickly found another job in the field in which he had been trained, and he resigned from his Baylor job prior to the end of the ten month period and took the new job. He left that job a year later for another higher paying job. By the time of trial, Mr. DeNunzio was earning more than he had when he worked at Baylor.

REASONS FOR DENYING THE WRIT

Petitioners assert that this Court should grant a Writ of Certiorari in order to determine the scope of protection afforded by the anti-retaliation provision of the Fair Labor Standards Act ("FLSA") and to secure uniformity of decisions among the Circuit Courts of Appeal. As will

be discussed in more detail below, this is not an appropriate case for the Court to determine the scope of protection provided by the anti-retaliation provision of the Fair Labor Standards Act. Further, the Fifth Circuit correctly decided this case.

First Ground – This Case Does Not Merit Supreme Court Review

Petitioners assert that the Court should grant a Writ of Certiorari in order to determine the scope of protection afforded by the anti-retaliation provision of the Fair Labor Standards Act and to secure uniformity of decisions among the Circuit Courts of Appeal. While there may be a split in authority among the Courts of Appeal as to the scope of the anti-retaliation provision, this is not the case in which to resolve the issue. Had the Court desired to address the issue this term, the Court had a case before it in which the issue was clearly presented in an en banc decision from the Ninth Circuit, *Lambert v. Ackerly*, 180 F.3d 997 (9th Cir. 1999) (en banc), *cert. denied*, 2000 U.S. LEXIS 591 (Jan. 18, 2000); however, the Court recently declined to grant a Writ of Certiorari in the *Lambert* case. If the *Lambert* case does not merit Supreme Court review, then the instant case certainly does not merit Supreme Court review.

Petitioners are requesting that this Court reach and decide an issue which the Fifth Circuit wisely and correctly decided that it need not reach. The Fifth Circuit, after reviewing the entire trial record of almost 500 pages of testimony, concluded that the jury charge did not create a substantial and ineradicable doubt that the jury

was properly guided in its deliberations. Petitioners would have this Court conduct another evidentiary review to determine whether this Court believes that the jury instructions created a substantial and ineradicable doubt that the jury was properly guided in its deliberations. Petitioners are contending that the Fifth Circuit misapplied the standard of review for claims of error in a jury charge. This is a contention that the Fifth Circuit misapplied a rule of law. As this Court's Rule 10 states: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." There is no question that the Fifth Circuit properly stated the applicable standard of review for asserted claims of jury charge error, and, as will be discussed in more detail below, the Fifth Circuit properly applied that rule of law.

What Petitioners really seek is an advisory opinion. Petitioners want this Court to adopt the liberal interpretation of the Fair Labor Standards Act anti-retaliation provision; however, even if the Court adopted that position, it would not affect the result in this case. Petitioners would still lose the case under the liberal interpretation. This Court does not sit to issue advisory opinions; rather, it reviews judgments. The judgments of the District Court and Court of Appeals are correct, and this Court need not further review them. This case is of no importance other than to the parties, and the case does not merit the attention of this Court. In addition to being an unimportant case, the case was, as will be demonstrated below, correctly decided.

Second Ground – This Case Was Correctly Decided

In their Petition, Petitioners claim that the District Court erred in two respects: (1) in the wording of the jury instructions given to the jury regarding Deborah D'Annunzio's claim and (2) in directing a verdict against Stephen DeNunzio. Petitioners further claim that the Fifth Circuit erred in affirming the District Court's judgment and rulings.

There are two standards of review applicable to the challenged rulings. The standard of review for an alleged erroneous jury instruction is as follows:

> First, the challenges must demonstrate that the charge as a whole creates "substantial and ineradicable doubt whether the jury has been properly guided in its deliberations." Second, even if the jury instructions were erroneous, we will not reverse if we determine, based upon the entire record, that the challenged instruction could not have affected the outcome of the case. If a party wishes to complain on appeal of the district court's refusal to give a proffered instruction, that party must show as a threshold matter that the proposed instruction correctly stated the law.

Mooney v. Aramco Services, Inc., 54 F.3d 1207, 1216 (5th Cir. 1995) (*quoting FDIC v. Mijalis*, 15 F.3d 1314, 1318 (5th Cir. 1994)). The standard of review for the second issue will be discussed following the discussion of the first issue.

Applying the standard of review for jury instructions, the Fifth Circuit reviewed the entire record and determined that there was no substantial and ineradicable doubt whether the jury was properly guided in its

deliberations. The record also demonstrated that the challenged instruction could not have affected the outcome of the case. Petitioner D'Annunzio argued that the instruction was harmful to her because it caused the jury not to consider various events which Petitioner alleged were retaliatory and which took place before a formal complaint was filed. Both Petitioners testified that a formal complaint was filed on July 15, 1996, well before the termination occurred in August 1996. Thus, the jury had before it evidence that Baylor terminated Petitioner D'Annunzio after she filed a formal complaint with the Department of Labor. The jury had to decide whether Petitioner was terminated for her insubordinate conduct or for filing a complaint with the Department of Labor. The jury obviously decided that Baylor terminated her for insubordinate behavior. As the jury had before it evidence that Petitioner made a formal complaint prior to the termination, the District Court's instructions to the jury could not have changed the outcome. The jury had to decide whether unlawful retaliation was the reason for the termination, and the jury decided that it was not.

The District Court did not tell the jury not to consider alleged retaliatory conduct which occurred after the informal complaints but before the formal complaint. In fact, Petitioner D'Annunzio testified at length about the informal complaints and the alleged retaliatory conduct in response thereto. Thus, the jury was able to fully consider this alleged conduct and to determine whether Baylor was an employer which would retaliate for complaints of FLSA violations.

A review of the entire record revealed that the challenged instruction could not have affected the outcome of

the case. The trial court allowed Petitioner to present evidence of both her informal and her formal complaints, and Petitioner was allowed to detail all of the alleged retaliatory conduct. The jury simply chose not to believe Petitioner's concocted story and instead found the Baylor witnesses to be considerably more credible. While the transcript of a trial often does not reveal much about a witness's credibility, the trial transcript in this case shows that neither Petitioner was credible. The transcript of their testimony shows that they were evasive, exaggerated their stories, gave non-responsive answers, tried to testify to matters which were the subject of an order on a motion in limine, and would not admit the obvious. Indeed, had the trial court used Petitioner's suggested charge to the jury, the result would have been the same. The jury simply did not believe that complaints about overtime were the reason for the termination; rather, Ms. D'Annunzio's inappropriate behavior caused her termination. As a review of the record showed that the challenged instruction could not have affected the outcome of the cause, the Fifth Circuit properly affirmed the judgment.

Because the Fifth Circuit determined that it did not have a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations, the Court did not have to address the issue of the scope of the anti-retaliation provision of the FLSA. As the Court did not address the scope of the provision, it could not possibly have erred on this point as Petitioners claim.

With regard to Stephen DeNunzio's claim, Mr. DeNunzio contends that the District Court erred in granting judgment against him as a matter of law following the

conclusion of Petitioners' case in chief. The applicable standard of review is set forth in Federal Rule of Civil Procedure 50(a)(1) which provides:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

"If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper." *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc). "A mere scintilla of evidence is insufficient to present a question for the jury." *Id.* The appellate courts use the same standard in reviewing the decision of the trial court. *Houser v. Sears Roebuck & Co.*, 627 F.2d 756, 757 (5th Cir. 1980).

The only activity which Mr. DeNunzio testified to and which could possibly be protected activity was his claim to have discussed with a co-worker and his supervisor some unspecified opinion that he had formed about Baylor. Such discussion would not amount to protected activity, and Mr. DeNunzio fails to meet even the liberal interpretation adopted by some circuits. Mr. DeNunzio also failed to present any evidence that his supervisor knew about his wife's alleged protected activity. The fact

that someone employed by Baylor may know of protected activity is immaterial if the relevant decision-maker does not. *Long v. Eastfield College*, 88 F.3d 300, 307 (5th Cir. 1996); *Larson v. Club Corporation of America*, 855 F.Supp. 247, 251 (N.D. Ill. 1994). Because Mr. DeNunzio failed to produce any evidence that his supervisor knew of the alleged protected activity, Baylor was also entitled to judgment as a matter of law on this basis.

In summary, the District Court gave Petitioners a full and fair trial. The court allowed Stephen DeNunzio to present his case, and the court granted judgment as a matter of law after Petitioners rested and it was apparent that Mr. DeNunzio could offer no evidence on at least two elements of his claim. The District Court allowed Deborah D'Annunzio's claim to go to the jury, and the jury, having heard three days of evidence, promptly decided that Baylor terminated Ms. D'Annunzio for her insubordination rather than for filing a complaint with the Department of Labor.

CONCLUSION

Petitioners have failed to provide any compelling reasons for this Court to grant a Writ of Certiorari. Petitioners contend the Fifth Circuit Court of Appeals reached an incorrect result; however, this appears to be an argument that the Fifth Circuit erred in its determination that the jury instructions did not create a substantial and ineradicable doubt that the jury was properly guided in its deliberations. The Fifth Circuit reviewed the entire record of the trial in reaching this conclusion, and this

Court would necessarily have to conduct the same evidentiary review. Such an evidentiary review is not favored by this Court. Further, this case has not been used by the District Court or the Court of Appeals to state a new and important position on an important or unsettled question of the law. Instead, this is a case only of significance to the parties. Additionally, the Fifth Circuit Court of Appeals was correct in its decision. This case does not merit further review by this Court.

For all of the foregoing reasons, Respondent Baylor University requests that Petitioners' petition be denied.

Respectfully submitted,

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